

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of ALVAREZ, Minors.

UNPUBLISHED

April 22, 2014

No. 317673

Oakland Circuit Court

Family Division

LC No. 11-786314-NA

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Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM.

Respondent-mother, A. Darner, appeals as of right the trial court's order terminating her parental rights to her four minor children under MCL 712A.19(b)(3)(c)(i) (conditions leading to adjudication continue to exist) and (g) (failure to provide proper care and custody). We affirm.

**I. FACTS**

**A. BACKGROUND FACTS**

Darner became addicted to Vicodin after giving birth by C-section in 2009, and she was referred to a methadone clinic for Vicodin addiction. In 2010, Darner's son tested positive for marijuana when he was born, and Darner reported suffering from post-partum depression. The Department provided Darner with in-home services, which she successfully completed.

In March 2011, Child Protective Services received an allegation that Darner had improperly supervised her oldest daughter. The March 2011 allegations also involved substance abuse and mental instability.

**B. THE CHILDREN'S REMOVAL**

On July 8, 2011, Child Protective Services removed Darner's three oldest children after a two-year-old child in her care suffered serious burns to his eyes, chest, and genitals, as well as bruising and scratching. The Department's original petition alleged that Darner had failed to provide the younger children with proper care and custody because she was currently incarcerated. Darner waived a probable cause determination, and a hearing referee placed Darner's children in the Department's care.

On August 17, 2011, the Department filed an amended petition. The amended petition provided that Darner (1) left the children without proper care and custody because she was

currently incarcerated, and (2) while in her care, a minor child sustained significant physical injuries. Darner pleaded no contest to the allegations in the petition. Mackenzie Scott-Carney, a Child Protective Services investigator, testified that a child was seriously injured and that Darner admitted that the child was in her care at the time. Darner was in jail, and her husband and the children's legal father, L. Alvarez, was residing in Mexico and unable to return to the United States. The trial court eventually terminated L. Alvarez's parental rights, and he is not a party to this appeal.

### C. DARNER'S PROGRESS BEFORE THE TERMINATION PETITION

On September 29, 2011, Darner signed a parent agency treatment plan, in which she agreed to obtain housing, attend a psychological evaluation, attend counseling, participate in parenting classes and parenting time, and participate in drug screens. At that time, Darner took Adderall for ADHD, Klonopin for anxiety, and Paxil for depression. Darner also received treatment at a methadone clinic.

In October 2011, Erica Watkins, the children's foster care services specialist through the Department, testified that Darner was five months pregnant. Monica Clark, the children's foster care case worker through Bethany Christian Services, testified that Darner was often late to visits and had trouble managing her time. Darner tested negative for most illegal substances, except one positive screen for amphetamines, and had completed her parenting classes.

In February 2012, Darner's youngest child was born. The Department filed a second amended petition, which restated the allegations in the original petition and additionally alleged that Darner and Yovany Alvarez, Darner's live-in partner and the suspected biological father of two of Darner's children, had a history of domestic violence. Darner pleaded no contest to the allegations in the petition.

In March 2012, Darner tested positive for opiates as well as methadone. Amanda Mason, the prosecutor, expressed that the Department's primary concern was drug use. Mason was concerned that some of Darner's drug testing dates and medication dates were inconsistent. The trial court noted that Darner was making steady progress.

Watkins expressed that the Department was having difficulty getting Darner into counseling. However, in July 2012, Adrienne Wells, Darner's case manager at CNS counseling services, testified that delays in counseling were attributable to Darner as well as CNS. Specifically, Wells testified that Darner had not contacted her for a month after referral, and that it took three months to complete Darner's service plan because Darner was "very hyper verbal." Wells admitted that some of the delay was attributable to CNS because she and Darner would "play phone tag."

In October 2012, Clark recommended terminating Darner's parental rights. Clark reported that Darner was still failing to take her medications as prescribed and exhibiting symptoms of depression. Clark also stated that some parenting time visits had been cancelled due to Darner's chronic tardiness. The Department petitioned to terminate Darner's parental rights.

#### D. DARNER'S PROGRESS AFTER THE TERMINATION PETITION

Watkins testified that, after the Department filed the petition, Darner tested positive for marijuana, stopped participating in counseling, and stopped participating in drug screens. Clark testified that Darner reported that she was no longer taking her medications. Darner later testified that she no longer needed her depression medication. The Department suspended Darner's parenting visits in January 2013 after Darner was yelling and using profanity at Yovany Alvarez in the Department's lobby after a parenting time visit.

At the March 2013 review hearing, Clark reported that Darner was again taking medications as prescribed, and was no longer on methadone. However, Clark expressed concern that Darner had been having unsupervised contact with the youngest child. Darner later testified that she had been caring for the child and that Watkins was aware of it. However, Darner also testified that she was sometimes late to parenting visits because she had to find a babysitter for the child, since "we couldn't bring her there because we weren't supposed to have her[.]"

#### E. THE TERMINATION HEARINGS

At the termination hearing, Clark testified that Darner had not benefitted from services, and that she would need at least six to twelve months to make progress. Clark testified that she did not believe that Darner ever took responsibility for injuring a child in her care. Darner testified that the child was not injured in her care, and that she believed that the Department should not have taken her children.

Concerning proper care and custody, Clark testified that Darner frequently drove on a suspended license, and was recently jailed. Clark testified that Darner did not have employment during the case, and relied on Yovany Alvarez for support. Clark testified that Darner did not attend her son's medical appointments and inappropriately administered his medications. Clark also testified that Darner's inability to manage her time made it unlikely that she would be able to timely take her son to medical appointments, or the children to school.

Clark testified that she did not believe that Darner benefitted from domestic violence counseling because she continued to engage in behavior with Yovany Alvarez, and would yell at Clark over the phone and then hang up. Yovany Alvarez testified that he and Darner had not engaged in violence since the case began. Clark also testified that Darner did not have appropriate housing. At the last termination hearing, Judith Zeolla, a family friend, testified that Darner's kitchen floor had a hole in it leading into the basement.

Karen Hanks, the children's new case manager at Bethany Christian Services, testified that Darner tested negative for opiates and methadone, but above the "cut off" for her Adderall and Klonopin, and she had also recently tested positive for Xanax, which she did not have a prescription for. Yovany Alvarez testified that Darner was not taking too much Adderall because he dispensed it to her.

Clark testified that the children loved Darner and were very bonded to her, as did the three daughters' foster care mother. Zeolla testified that Darner was a good parent. The foster mother testified that she was willing to provide the daughters with stability.

## F. THE TRIAL COURT’S OPINION AND ORDER

The trial court found that the conditions that led to adjudication had actually worsened, and that there was no reasonable likelihood that Darner could rectify them in a reasonable time. The trial court also found that, regardless of Darner’s good intentions, it was not reasonably likely that she could provide the children with proper care and custody.

The trial court found that Darner was impulsive and had mental health issues that she had not appropriately addressed. It also found that Darner has “serious time management problems,” is “impulsive,” and has “no ability to follow rules.” It found that Darner suffered from severe depression and was unable to take care of herself, and that the children would be unable to rely on Darner.

The trial court also found that Darner had substance abuse issues. The trial court found that Darner had gotten off methadone, but “then other drugs have replaced that . . . .” The trial court found that Darner also did not drug test consistently, and had both missed drug screens and tested positive.

The trial court found that Darner had not secured housing and employment. It found that Darner was relying on Yovany Alvarez, who did not have a legal relationship to her or the children. The trial court found that Darner’s housing had gotten worse and was “unlivable.”

Considering the children’s best interests, the trial court found that the children were very bonded to Darner. The trial court found that Darner had allowed inappropriate persons to babysit her youngest child when the child was not supposed to be in Darner’s care. It also found that Darner would be unable to care for her son’s special medical needs.

The trial court found that Darner could not take care of herself, had inappropriate housing, had unaddressed mental health problems, and might have a drug issue. It determined that termination was in the children’s best interests, and terminated Darner’s parental rights.

## II. REASONABLE EFFORTS

### A. STANDARD OF REVIEW

We review for clear error whether a trial court engaged in reasonable efforts to reunify a child with his or her parent.<sup>1</sup> We review for clear error the trial court’s factual findings.<sup>2</sup> A finding is clearly erroneous if “although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.”<sup>3</sup>

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<sup>1</sup> *In re Mason*, 486 Mich 142, 152, 166; 782 NW2d 747 (2010).

<sup>2</sup> *Id.*

<sup>3</sup> *In re Mason*, 486 Mich at 152, quoting *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

## B. LEGAL STANDARDS

A parent has a fundamental liberty interest in the care and custody of his or her children.<sup>4</sup> The trial court must make reasonable efforts to reunify a child with his or her family unless aggravating circumstances are present.<sup>5</sup> The purpose of a case service plan is to facilitate returning children to their parents.<sup>6</sup> Accordingly, a parent's service plan must address the problems that brought the children into care.<sup>7</sup>

## C. APPLYING THE STANDARDS

Darner contends that the trial court's service plan did not address the problems that brought the children into care, and that it placed unnecessary hurdles between Darner and her children. We disagree.

Darner contends that the Department never proved its allegations regarding the two-year-old's serious injuries and domestic violence against Yovany Alvarez. The record does not support this contention. Here, Darner pleaded no contest to petitions that included allegations that (1) a two-year-old child was significantly injured while in Darner's care, and (2) she engaged in domestic violence with Yovany Alvarez. Scott-Carney testified that the two-year-old was significantly injured, and that Darner admitted to her that this occurred while the child was in Darner's care. Rashana Baker, a Child Protective Services investigator, testified that she was aware of three domestic violence incidents between Darner and Yovany Alvarez and that, on one of those incidents, Yovany Alvarez had rammed into Darner's car with another car while the children were inside Darner's car. The workers' testimonies were sufficient to support Darner's pleas under MCR 3.971(C)(2), and were sufficient to support the trial court's determination that mental health and domestic violence counseling services were necessary.

Additionally, to the extent that Darner believed that her counseling services and parenting time were insufficient, the trial court addressed these issues during the pendency of the proceedings. The trial court investigated Darner's allegations that the Department delayed counseling services. Wells testified that much of the delay was attributable to Darner, and the trial court subsequently found that the Department engaged in reasonable efforts to reunify Darner with her children. Given that the delay was partially attributable to Darner, the trial court's findings were not clearly erroneous.

Further, Darner agreed to the rest of the services in this case, including obtaining housing and employment, a psychological evaluation, counseling, parenting classes, and drug screens. The time for a parent to challenge a service plan is when the trial court initially adopts it.<sup>8</sup>

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<sup>4</sup> *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982).

<sup>5</sup> MCL 712A.19a(2).

<sup>6</sup> MCL 712A.18f(3); *In re Mason*, 486 Mich at 156.

<sup>7</sup> MCL 400.115b(2); MCL 712A.18f(2); *In re Rood*, 483 Mich 73, 99; 763 NW2d 587 (2009).

<sup>8</sup> *In re Terry*, 240 Mich App 14, 27; 610 NW2d 563 (2000).

Darner never challenged her service plan before the trial court, or requested additional services. We conclude that Darner has waited too long to challenge the sufficiency of her service plan.

### III. STATUTORY GROUNDS

#### A. STANDARD OF REVIEW

This Court reviews for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination.<sup>9</sup> The trial court's factual findings are clearly erroneous if the evidence supports them, but we are definitely and firmly convinced that it made a mistake.<sup>10</sup>

#### B. LEGAL STANDARDS

MCL 712A.19b(3)(c)(i) provides that the trial court may terminate a parent's rights if:

[t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

A parent must not only participate in a service plan, but must benefit from it.<sup>11</sup>

MCL 712A.19b(3)(g) provides that the trial court may terminate a parent's rights if

[t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

A parent's failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide a child with proper care and custody.<sup>12</sup> A parent's mental illness can affect that parent's ability to parent a child.<sup>13</sup>

#### C. APPLYING THE STANDARDS

Darner contends that the sole condition leading to adjudication was that Darner was imprisoned. We disagree with Darner's factually inaccurate contention, and conclude that the

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<sup>9</sup> MCR 3.977(K); *In re Mason*, 486 Mich at 152.

<sup>10</sup> *In re Mason*, 486 Mich at 152.

<sup>11</sup> *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003).

<sup>12</sup> *Id.*; *In re Trejo Minors*, 462 Mich 341, 363; 612 NW2d 407 (2000).

<sup>13</sup> See *In re Utrera*, 281 Mich App at 23, 25; 761 NW2d 253 (2008).

trial court did not err when it determined that the conditions leading to adjudication continued to exist.

The trial court exercised its jurisdiction over the children pursuant to Darner's no-contest pleas, which Scott-Carney's and Baker's testimonies supported. These testimonies included that a child was seriously injured in Darner's care and that Darner engaged in domestic violence with Yovany Alvarez. The Department recommended domestic violence, substance abuse, and counseling services to address Darner's issues that led to the child's abuse or neglect. Darner signed a treatment plan, stating that she would participate in these services.

Clark testified that Darner participated in services, but failed to benefit from them, and testified that the trial court could not safely return Darner's children for six months to one year. The lengthy record in this case demonstrates that Darner did not consistently drug test, did not consistently participate in counseling services after that service was established, did not consistently take her medication, and continued to engage in verbal altercations after domestic violence counseling. We are not definitely and firmly convinced that the trial court made a mistake when it found that Darner did not benefit from services, that the conditions leading to adjudication continued to exist, and that it was not reasonably likely that Darner would be able to correct them within a reasonable time.

Darner also contends that termination under MCL 712A.19b(3)(g) was inappropriate because she did not have a severe mental illness or severe drug abuse. We disagree.

As well as the reasons stated above regarding Darner's mental health and substance abuse issues, Darner also demonstrated that she was impulsive and incapable of following rules and laws designed to keep her children safe. For instance, Clark testified that Darner drove on a suspended license with her child in the car, making it likely that Darner would again be arrested and leave her children without proper care. Additionally, Zeolla testified that, when Darner's youngest child was in her care—despite Darner's knowledge that she was not supposed to have the child—Darner left that child in the care of inappropriate persons. We are not definitely and firmly convinced that the trial court made a mistake when it determined that Darner could not provide her children with proper care and custody.

#### IV. BEST INTERESTS

##### A. STANDARD OF REVIEW

The trial court must order the parent's rights terminated if the Department has established a statutory ground for termination by clear and convincing evidence and it finds from a preponderance of evidence on the whole record that termination is in the children's best

interests.<sup>14</sup> We review for clear error the trial court's determination regarding the children's best interests.<sup>15</sup>

## B. LEGAL STANDARDS

The trial court should weigh all the evidence available to determine a child's best interests.<sup>16</sup> To determine whether termination of parental rights is in a child's best interests, the court should consider a wide variety of factors that may include "the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home."<sup>17</sup> The trial court may also consider a parent's history of domestic violence and the parent's compliance with his or her case service plan, the parent's visitation history and compliance with court-ordered plans, the children's well-being while in care, and the possibility of adoption.<sup>18</sup>

## C. APPLYING THE STANDARDS

### 1. CONSIDERATION OF THE CHILDREN'S BEST INTERESTS

Darner contends that the trial court improperly found that termination was in the children's best interests when Darner was a good parent who was bonded to her children, the children had been moved frequently, and the children were not placed in the same home. We disagree.

We note that, while the children's multiple placements may contribute to their needs for permanency, no single factor is determinative concerning the children's best interests. The trial court should weigh all the evidence available to determine the children's best interests.<sup>19</sup>

Here, the trial court found that the children loved and were bonded to Darner, and that the children were not placed in the same home. However, it also considered the children's needs for permanency, Darner's inability to care for her son's medical needs, Darner's failure to comply with court orders, Darner's failure to comply with the case service plan, and Darner's mental health and substance abuse issues. In consideration of the weight of other factors, the trial court

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<sup>14</sup> MCL 712A.19b(5); *In re Olive/Metts Minors*, 297 Mich App at 40; *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013).

<sup>15</sup> MCR 3.977(K); *In re Trejo Minors*, 462 Mich at 355-356.

<sup>16</sup> *In re Trejo Minors*, 462 Mich at 356-357.

<sup>17</sup> *In re Olive/Metts Minors*, 297 Mich App at 41-42 (internal citations omitted).

<sup>18</sup> See *In re BZ*, 264 Mich App 286, 301; 690 NW2d 505 (2004); *In re Jones*, 286 Mich App 126, 129-130; 777 NW2d 728 (2009); *In re AH*, 245 Mich App 77, 89; 627 NW2d 33 (2001).

<sup>19</sup> *In re Trejo Minors*, 462 Mich at 356-357.



determined that it was in the children's best interests to terminate Darner's parental rights. We are not definitely and firmly convinced that the trial court made a mistake.

## 2. CONSIDERATION OF THE FOSTER HOME

Darner contends that the trial court improperly considered the benefits of a foster home when terminating her parental rights. We disagree.

Though the trial court may not consider the advantage of a foster home when determining whether it has statutory grounds to terminate a parent's parental rights, after the statutory grounds are met, the trial court may consider the advantages of a foster home placement to determine the child's best interests.<sup>20</sup> Here, the trial court did not consider the benefits of the foster home when ruling on the statutory grounds. Rather, it only considered the children's placement in foster care when ruling on the children's best interests.

Further, to the extent that Darner argues it was inappropriate for the trial court to take testimony during a combined hearing on the statutory ground and best interests, we conclude that Darner has waived review of this issue. "Under the doctrine of invited error, a party waives the right to seek appellate review when the party's own conduct directly causes the error."<sup>21</sup> A party's express approval of the trial court's action constitutes a waiver.<sup>22</sup>

Here, Mason noted that she had spoken with Darner's attorney about "continuing with the rest of the testimony and then making arguments on statutory and best interests at the end so the court can sort of consolidate [the] rulings . . . ." Mason stated that everyone was in agreement. Darner's attorney then stated "That is correct, your Honor[.]" Darner's approval of combined statutory grounds and best interests hearings constitutes a waiver that extinguished any error.

## V. CONCLUSION

We conclude that Darner has not timely challenged the reasonableness of the Department's efforts to reunify her with her children. We also conclude that the trial court did not clearly err when it determined that statutory grounds supported terminating Darner's parental rights and that termination was in the children's best interests.

We affirm.

/s/ Stephen L. Borrello  
/s/ William C. Whitbeck  
/s/ Kirsten Frank Kelly

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<sup>20</sup> *In re Foster*, 285 Mich App 630, 635; 776 NW2d 415 (2009).

<sup>21</sup> *People v McPherson*, 263 Mich App 124, 139; 687 NW2d 370 (2004).

<sup>22</sup> *Id.*; see *People v Jones (After Remand)*, 197 Mich App 76, 81; 495 NW2d 159 (1992).